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February 2, 2018

Deana Williamson, Clerk of the Court
Court of Criminal Appeals
P.O. Box 12308
Capital Station
Austin, Texas 78711

RE: ***Jason Ramjattansingh v. State of Texas, No. PD-0972-17***

Dear Ms. Williamson:

Please file the attached pre-submission appendix with the papers of the Court in the above-styled and numbered matter prior to oral argument on February 7, 2018. I will file ten paper copies of this appendix with the Court on February 6, 2018.

There is also an error in Appellant's merits brief he wants to correct: the citation to *Griego v. State* on p. 18 should read *Peraza v. State*, 457 S.W.3d 134, 142 n. 5 (Tex.App. – Houston [14th Dist.] 2014), *reversed on other grounds*, 467 S.W.3d 508 (Tex.Crim.App. 2015)(appellate court may properly take judicial notice of information available on various websites, including government websites).

Pursuant to TEX.R.APP.P. 9.5(d), I have served opposing counsel, Katie Davis and Stacey Soule with a copy of this document via e-filing.

Sincerely yours,

BRIAN W. WICE

APPELLANT'S PRE-SUBMISSION APPENDIX

JASON RAMJATTANSINGH V. STATE OF TEXAS

PD. NO. 0972-17

TRANSCRIPT OF STATE'S ORAL ARGUMENT

IN THE FIRST COURT OF APPEALS

MAY 16, 2017

PRESENTED BY KIMBERLY A. STELTER

ASSISTANT DISTRICT ATTORNEY

HARRIS COUNTY, TEXAS

JASON RAMJATTANSINGH, Appellant,

v.

THE STATE OF TEXAS, Appellee.

No. 01-15-01089-CR

Court of Appeals of Texas, First District, Houston.

MAY 16, 2017

PARTIAL TRANSCRIPT OF ORAL ARGUMENT
(BY THE STATE OF TEXAS ONLY)

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(Excerpt of the State's Argument.)

MS. STELTER: May it please the Court? My name is Kim Stelter and I represent the State in this matter, which I usually now say the name of the Defendant, but I'm not going to attempt that.

So despite the amount of pages that we've devoted to this issue and the amount of --

JUSTICE BLAND: Well, let's just get to *Malik*, and *Malik* says that we're to measure the legal sufficiency of the evidence under the hypothetically correct charge.

MS. STELTER: Uh-huh.

JUSTICE BLAND: Is it the State's position that the charge that the trial court gave that matched the State's charging instrument, is it the State's position that it's not a correct charge, that it's hypothetically incorrect?

MS. STELTER: The State's position is that --

JUSTICE BLAND: I guess not hypothetically, but it was incorrect?

MS. STELTER: There is surplusage in that charge, just as there are in a number of cases where *Malik* is applied when you add more details than you need to add, and that is certainly not part of the statute that it be "at or near" the time of the offense. We added that in there. We did not need to add it in there. It is surplusage. It's

not -- by adding it, we don't make it an element of the offense any more than we can take away an element of an offense.

JUSTICE BLAND: Well is there some --

JUSTICE HIGLEY: You didn't object to it, did you?

MS. STELTER: No, we did not object to it.

JUSTICE HIGLEY: What I understand, okay.

MS. STELTER: Right.

JUSTICE BLAND: Is there some implied temporal element, though? I mean, theoretically if there's none at all, somebody could be driving while intoxicated and the breathalyzer could be administered two days later.

MS. STELTER: I think that --

JUSTICE BLAND: No one would argue that that was -- that those two were related, so was the "at or time" just sort of the implied temporal relationship between the breathalyzer and the actual underlying elements of driving while intoxicated?

MS. STELTER: Again, I don't know what the policy was. I was not here when that language was added, but I think that there could become a point where, as you very well point out the test, and the driving could become so attenuated that there's a due process issue. Or -- and this language might have been added to keep the time frame a little more consistent, a little bit so that you don't have

two days later.

I mean, I think there would be a great challenge to that type of statute if there was.

But I'd like to make one correction on the math, which unfortunately -- I apologize. I think Counsel keeps relying on my misstatement.

JUSTICE BLAND: It was more like two hours that night.

MS. STELTER: Exactly.

JUSTICE BLAND: Yeah, but that we figured out.

MS. STELTER: It was an hour and 55 minutes -- really an hour -- if you look at the tapes and I listened to them, the time that he was pulled over was about 9:35, so.

JUSTICE BLAND: But the reality is even under the -- under that math, it's still longer than the difference in time in *Meza*.

MS. STELTER: Absolutely.

JUSTICE BLAND: And it's still -- it's still the expert saying, I can't tell you what the alcohol was --

MS. STELTER: Right, which we did not and that's, I think, the big distinction on *Meza*. And that *Meza* we were focused on the retrograde extrapolation. And we never argued at the trial that there's -- here's the time of the test. And we never emphasized the word "near."

And in this case we clearly did. We told the jury

this -- "Here's when the offense occurred. Here's when the test was taken. You, jury, get to decide what near is."

Near is an undefined term. I don't think it's beyond the scope of reality to say that less than two hours could be near the time of the offense.

And *Meza* really never talked about that, and if you look at the Court's opinion in *Meza*, they keep using -- instead of "at or near," they use terms like that there -- "We could not prove the BAC at the time of driving" or "while he drove" or -- these are all quotes -- "immediately before he crashes his vehicle" or "immediately before the wreck."

There's no "at" or "immediately." There is no just "at." This is an "at or near."

JUSTICE HIGLEY: And so that's how you would --

MS. STELTER: I can see there's -- huh?

JUSTICE HIGLEY: That's how you would distinguish *Meza* then from this case?

MS. STELTER: Yes. I would say that the focus was on the extrapolation evidence and that we could not prove by the extrapolation evidence that while he was driving or immediately before that, there was this point -- this alcohol content.

We didn't even introduce that evidence. There's like pages and pages in the *Meza* opinion, I think like three

pages where they discuss the expert's testimony on this retrograde extrapolation. We admitted we can't do it, we're not doing it. Here's the time. Here's when the test was taken. You can decide what "near" is, jury.

The jury said, "Could we see the videotape? We want to see the time of the offense." And they already had the time of the test, which was 11:28.

So their focus -- they're listening to what the prosecutor said. They're deciding what the time is and whether it is "near" and that's where I -- yes, I would distinguish *Meza* because the focus was all, and the language all, on while he was driving. And I have to say that that was the point of error was phrased in that way: Was the evidence showed that he had a .15 while driving? You know, or that he had the offense and while driving, he had that .15.

JUSTICE BROWN: So you are arguing that the charge, as given, you satisfied the evidence because it was "near" and that was a jury determination, correct?

MS. STELTER: Absolutely, yes.

JUSTICE BROWN: But in addition to that, you're arguing -- this is kind of your fall back -- that even if you don't have enough evidence, that we should look at, under the hypothetically correct charge, without the "near" language, correct?

MS. STELTER: Correct.

JUSTICE BROWN: And so then he argues, well this was -- and he wasn't sure if he wanted to use the word "estoppel" or "invited error," but he says essentially this was because the District Attorney had a policy of trying this offense this way with this language?

MS. STELTER: Judge Bland -- or Justice Bland was absolutely correct. That is not the statement that was made. There was the statement that once we charged something, it's our policy -- a misdemeanor prosecutor in this case, which is a separate case -- which you cannot get estoppel from a separate case. If I'm looking at all the case law that the Defendant has cited, it's all about whether or not you're estopped in that case from making two different arguments.

In this case a misdemeanor prosecutor said, "No, we're not going to do that. It's our policy to go ahead." And he just went ahead with it.

Now that does not mean that that was our policy to charge this way. He did not say that and I would encourage you -- well --

JUSTICE BROWN: Okay. So let me ask you --

MS. STELTER: -- we don't have that Record before us.

JUSTICE BROWN: We don't. Well let me ask you --

MS. STELTER: And the jury didn't have *Meza* before us.

JUSTICE BROWN: Let me ask you about --

JUSTICE BLAND: Well I was just getting it from the opinion.

MS. STELTER: Right. I am, too.

JUSTICE BROWN: Here's what you said in your brief: "While the statute itself makes no temporal requirement between the analysis and the offense, by adding this language, the State did increase its burden."

That sounds like to me that you mean that the State is the one who added this language and willingly took on this burden.

MS. STELTER: Well that would be the case --

JUSTICE BROWN: Am I misreading that?

MS. STELTER: No. I agree that anytime there is a statute or anytime that we have an Indictment where we add extra language or we add surplusage, that's generally our adding it, but that does not prevent *Malik* from applying. It is always the case where we have -- you know, we have pled, for example, some of the cases are we plead the specificity of the go cart number. We don't need it, but we pled it. We added it. We increased our burden. But it's surplusage, we don't need it.

All these cases that deal with *Malik* and the

hypothetically correct jury charge are things where we pled with more specificity than we needed to do.

We did that in this case and it's still -- but it doesn't make it an element of the offense and *Malik* would still apply.

So there is a distinguishment as in *Meza* where we actually were told by the judge or kind of hinted at the judge, well you might want to withdraw this and we didn't. This is not the circumstance in this case. So there was -- that charge was in there. It just -- we acquiesced to it. It was part of the Record and now we're trying to reverse on it, but it's a perfect example of where *Malik* would apply, where *Gollihar* would apply, where all the other cases that I cited in my brief would apply.

So to sum it up, I think that it's clear, the jury -- "near" is not a technical term. And I think that -- again, I don't know the reason that the State added that language, but it could have been that they wanted to have some temporal connection so that things don't get so far that two days later --

JUSTICE BLAND: Is there a due process consideration then if you are charging the Defendant and saying we're going to prove the temporal connection, the Defendant then thinks we're going to defend predominantly based on the lack of a temporal connection and now on

appeal, the State takes the position that the temporal connection was surplusage.

MS. STELTER: I think if you look -- I mean, that could be a situation. If you look at the Defendant's -- the defensive theory throughout, it is not dealing with that. The defensive theory in its opening statement says these are two -- his two grounds: That there was no one to testify that the Defendant was driving, so their big issue was whether or not he was operating the car and the big concern was the 9-1-1 call and we don't -- we can't show that he's driving and there's no evidence that he was intoxicated at the time he was driving.

They said he stopped at a bar. He could have had a drink right there. So there was some issue -- or just because he was driving, we all know 290 is pretty awful to drive.

JUSTICE BROWN: I think that might have been their trial strategy, but don't they have the right to rely on the Indictment and say, okay, we think we've got an appellate bullet point. It's going to kill this, and that is they're not going to be able to prove extrapolation evidence of "at or near." They put it in the charge. We're relying on the charge and to take it away now would be to violate our rights.

MS. STELTER: Well I guess I would have two

responses. One is that the evidence is sufficient under the "near." So I would not have a problem. I think it would prove it.

JUSTICE BLAND: But why do you say that it's sufficient under the "near"? Are you saying it's because we don't need expert testimony to show "near" because "near" is a judgment call that's within the practical wisdom of the jury?

MS. STELTER: I'm saying that we don't need extrapolation evidence to get it any closer than the time of the test itself because the time of the test was near the offense.

There could be a case of where they do the test six hours later and it's not near -- I don't know what case. This isn't that case. But there was --

JUSTICE BROWN: But why not?

MS. STELTER: We didn't rely on extrapolation evidence.

JUSTICE HIGLEY: But you did not rely on extrapolation?

MS. STELTER: No, we did not. We said --

JUSTICE HIGLEY: I know they said they couldn't extrapolate.

MS. STELTER: Right. And we didn't. So we relied instead of the "at" language, which is really what *Meza*

seems to focus on, the "at" or "while driving" or "immediately there." We said, "Near."

JUSTICE BLAND: Well that seems to mischaracterize the holding in *Meza* because *Meza* spends a lot of time discussing the expert's lack of ability to extrapolate.

MS. STELTER: Right.

JUSTICE BLAND: And at the time -- that it's imprecise and then discusses the law that says, you know, we look to try to find. So I don't know that they necessarily didn't look at that. They just basically said there's no testimony in it to show -- but you're saying it didn't matter because it was over .15 an hour and a half later, that that's enough no matter what, I mean.

MS. STELTER: I'm saying that in *Meza*, all the parties seem to be focused on moving that needle, not at the time -- that they didn't really say the time of the test is sufficient. I don't think anybody ever discussed that or argued that. They said: We can't, you know, get close to -- we don't know what the extrapolation evidence is at the time or near or immediately and that "near" they were looking at is because of all this extrapolation evidence, they were all looking at how close can we get to the time of the offense? And we couldn't get there.

But nobody said -- nobody really discussed whether "near" -- the jury could have decided that test 85 minutes

different would have been itself sufficient, forget the extrapolation evidence. We should not -- in other words, I don't think that the extrapolation evidence was necessary at all in that case and there was such a discussion of it.

JUSTICE BROWN: Well while that may not have been your focus in *Meza*, you still had the same argument in *Meza*. You still could have said: An hour and a half is near and here, if an hour and a half is near, isn't two hours near?

MS. STELTER: I think that those --

JUSTICE BROWN: Or vice-versa -- or not near, excuse me, if an hour and a half is not near.

MS. STELTER: I think that they could have made that argument. They didn't make that argument. The prosecutor at trial didn't focus on the word "near."

JUSTICE BROWN: But in you appellate briefs, didn't you-all talk about "near" in *Meza*?

MS. STELTER: I don't think there was a discussion of whether the test itself was near.

JUSTICE BROWN: Okay.

MS. STELTER: I don't believe -- I don't believe that there was -- it was, again, focused on the extrapolation evidence and not on whether or not a jury could have just -- just get rid of that testimony altogether. Could the jury have said: An hour and 55 minutes? That shows that at the time of the analysis -- we

got that part. Okay. We also have that he's driving while intoxicated because we didn't need the .08 for that. We had him falling down drunk intoxicated and I don't think anybody disputes the fact that he was intoxicated because of mental or physical abilities.

And the jury charge allows for that. There's two different definitions of intoxication. So we've got the intoxication by the impairment theory. And then we have the time of the analysis of the test. That is the statute. We should be done right there. And I think under *Malik* we can be done, but if we continue to say "at or near" the time of the offense, I think we're still okay because the jury could have decided the -- not "at." I'll give up "at" because I'm not -- we can't prove that what his blood alcohol content was at the time of the offense, but we can prove what it was near.

And the test -- and that could be the test itself, so.

JUSTICE BROWN: Did your expert testify that it was near?

MS. STELTER: Our expert did not discuss near. Again, I think, you know, there are some terms of art that we use. "Arrest" has become a term of art. Some words are defined by the statute. "Near" is not one of those.

I looked this up. Yes, I was a -- my mother was

an English teacher -- and I looked up the definition of "near" and one of the things that they used as an example in -- and I cited in my brief -- they said that this occurred near the end of the war.

Well I'm guessing that's probably more than two hours. It's a temporal thing. It's a -- it's a -- what does "near" mean? So that's probably near the end of the war. It's usually maybe in the last couple of months if it's a long war. Maybe if it's a 100 years' war it's the last year, I don't know.

But if it is something that is near the time of the offense, I think the jury could certainly -- I mean, I would be uncomfortable telling a jury that -- or overruling a jury's decision that that was near.

So the definition of near, Your Honor, was not defined by anybody, but the prosecutor did remind the jury -- pointed out that language and said you can decide what near is, and they did and I think they did it correctly.

That's all I have.

Anymore questions?

JUSTICE HIGLEY: Thank you.

MS. STELTER: Thank you very much.

(End of excerpt.)

* * * * *

I certify that the foregoing is a correct

transcript to the best of my ability from the electronic sound recording of the proceedings in the above-entitled matter.

/S/ MARY D. HENRY

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